



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 621 OF 2015
BETWEEN
JUMA SENA DENACLAIMANT
VERSUS
SHAKATAK DISCOTHEQUE AND CLUBRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Marende, Birir, Shimaka & Company Advocates for the Claimant

The Federation of Kenya Employers [F.K.E] for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 21st August 2015. He states he was employed by the Respondent Discotheque as Head of Security, in 2005. He asked for 2 weeks off duty sometime in January 2014. He was to attend to his ailing Father, who unfortunately passed away during the off days. The Claimant went back to work at the end of his off days. He worked for 1 day. The next day the Manager told him the Director had decided the Claimant's contract is terminated. He was invited to attend a disciplinary hearing on 10th February 2014. No hearing was conducted, despite the Claimant's presence. He feels termination was unfair and unlawful and prays the Court for the following orders against the Respondent:-

- a) 12 months' salary in compensation for unfair termination at Kshs. 216,000.
- b) 1 month salary in lieu of notice at Kshs. 18,000.
- c) Gratuity at 15 days' salary for every year completed in service at Kshs. 81,000.
- d) House allowance in arrears, at Kshs. 972,000.
- e) Public Holidays worked at Kshs. 86,400.

f) Annual leave days at Kshs. 162,000.

g) Costs.

h) Interest.

i) Any other suitable remedy.

2. The Respondent filed its Statement of Response on the 16th December 2015. Its position is that the Claimant was employed in the given position, earning a consolidated salary of Kshs. 14,430 as of the date of termination. He took his normal off duty days on 21st January 2014, but failed to report back, for 8 continuous days. The Respondent issued him a letter to show cause, why he should not be disciplined for absconding. He replied saying it was true he was not at work for 8 days, but that absence was authorized by his immediate Manager. The Manager recorded a statement denying such authorization. The Claimant was invited to attend a disciplinary hearing. He failed to attend hearing. The disciplinary process was suspended in the hope the Claimant would turn up at a future day, for hearing. He did not, but instead instructed Advocates who issued demand upon the Respondent for payment of terminal dues and compensation. The Respondent did not terminate Claimant's employment. The Claim has no merit. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. Parties agreed to have the dispute considered and determined on the strength of the record, through an order adopted by the Court on 17th October 2016. They confirmed filing of their Closing Submissions in Court at the last session on 6th December 2016.

The Court Finds:-

4. The Claimant states he was employed as Head of Security by the Respondent, '*sometime in the year 2005.*' The Respondent concedes to have employed the Claimant in the stated position, but in the year 2006, not 2005.

5. The rate of monthly salary is disputed. The Claimant states he earned Kshs. 18,000 basic monthly salary on termination. The Respondent states the rate was Kshs. 14,430 consolidated monthly salary. Reference is made to Respondent's appendix 1.

6. Respondent's appendix 1 is not helpful in resolving the date of employment and the rate of pay. This document is a contract of employment signed by the Parties on 1st August 2013. The Parties state the Claimant was employed either in the year 2005 or 2006. The contract of 2013 was not the first contract.

7. There is ambiguity in the contract of employment. The Court agrees with the Submission of the Claimant that in resolving the ambiguity, recourse is in Section 10[7] of the Employment Act 2007. This law provides that, if in any legal proceedings, an Employer fails to produce a written contract, or the written particulars prescribed in subsection [1], the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the Employer.

8. The Court shall adopt the employment year 2005, and a last monthly salary of Kshs. 18,000, as submitted by the Claimant, as the Respondent has not disproved these as the correct terms of the Claimant's last contract.

9. The Claimant prays for gratuity based on 9 years of service. He submits that this item is merited under a CBA concluded between the Respondent and KUDHEIHA. There is no CBA in the Court's record. There is no evidence that the Claimant was a member of any Trade Union, or covered under any CBA, through the agency of any Trade Union. There was no clause in any contract, or wage instrument, allowing the Claimant this benefit. The prayer for gratuity is rejected.

10. The written contract concluded in 2013 contains basic salary and house allowance. The Claimant

seeks house allowance for the entire period worked. It was not shown by the Claimant that the provision of consolidated salary, taking into account the housing element, had been discontinued, as of the date he left employment. His consolidated salary in 2013 was Kshs. 14,430. In 2014 when he left employment, an amount of Kshs. 18,000 which the Court has accepted was his monthly take-home, cannot possibly have comprised basic pay only. The prayer for arrears of house allowance is declined.

11. He prays for annual leave pay for a period of 9 years, based on 30 days of annual leave entitlement. The contract of 2013 gave him 24 days of annual leave. The Respondent provided nothing in disputing the claim for annual leave. The Witness Statements filed by Respondent's Director Jurgen Fuks, and Manager Margaret Muigai, say nothing of annual leave. The Statement of Response merely alleges the Claimant went on annual leave as per the legal requirement. The documents filed by the Parties do not contain anything on annual leave entitlement. The Claimant is allowed the prayer for annual leave for a period of 8 years, based on 24 days of annual leave, at a daily rate of Kshs. 692. **Annual leave pay is allowed at Kshs. 692 x 24 x 8 = Kshs. 132, 923.**

12. The prayer for public holiday pay was not well articulated in the Pleadings and Submissions of the Claimant. The days are not named. The mode of computation is unexplained. The Court is not able to grant this item. There is no sufficient material and submission placed before the Court to persuade the Court that the item is merited.

13. Lastly the Court is called upon to resolve the question whether termination was fair, and compensation and notice pay awardable.

14. The Court accepts the statements of Fuks and Muigai, that, the Claimant took his scheduled off duty days on 19th January 2014, and was to resume on 21st January 2014. He did not resume for 8 days.

15. Upon resumption, he was asked to show cause, why disciplinary action should not be taken against him, in a letter from Fuks, dated 28th January 2014.

16. The Claimant answered through his letter dated 31st January 2014. He conceded he was absent, but explained that his immediate Manager was aware the Claimant was to attend to a sick relative. The Manager allowed him to travel home for 1 week to sort out his domestic emergency. The Claimant stated he loved his job, and would not abscond.

17. Manager Muigai and Supervisor Shaban Ali regrettably denied having authorized Claimant's absence. They did so in a letter curiously addressed to Shakatak, not to any particular individual, and more curiously, dated 28th June 2015, in excess of 1 year, after the Claimant had replied to the letter to show cause. Their joint letter is appendix 3 of the Respondent's documents.

18. The Court is of the view that this letter was written in reaction to the Claimant's Advocates' demand letter to the Respondent, which is dated 24th June 2015. It was crafted by the Respondent in contemplation of the Claim. It cannot be upheld by this Court as a document genuinely made, recording a truthful account of the Claimant's absence from work between 19th January 2014 and 28th January 2014 or thereabouts.

19. The Claimant's account that he was issued permission by Muigai and the Supervisor is more persuasive. The first conclusion would be that he was away with the permission of the Manager.

20. Section 44 [4] [a] of the Employment Act 2007 makes it an act of gross misconduct warranting summary dismissal, if an Employee absents himself from the appointed place of work, without his Employer's leave, or without other lawful cause. Documents filed by the Parties, as concluded above, suggest the Claimant obtained the leave of his Manager. It is worth exploring if he was away also, without other lawful cause. If the Court is wrong, and there was no leave, was absence without lawful cause?

21. The Claimant explained to the Respondent he overstayed at home, because he was attending to an ailing member of his Family. He was allowed to attend to his Father by the Supervisor and the Manager. He was paid advance for the undertaking. His Witness Statement discloses his Father passed away on 21st January 2014. The Claimant went on to arrange for the funeral, and returned to work after burial. He obtained a burial permit and a letter from his area Chief, confirming the death of his Father. These documents are not contested by the Respondent.

22. If there was no leave granted by the Employer, absence in light of this, would be with lawful cause. The illness and death of a Parent, and involvement subsequently in funeral arrangements and bereavement, are lawful causes. It can be argued that a reasonable Employer would, in circumstances of grave illness, death, and bereavement, afford the affected Employee compassionate leave, rather than adopt draconian disciplinary measures, over the Employee's 8 days absence from work.

23. There was no valid ground to justify termination under Section 43 and 45 of the Employment Act.

24. The Respondent does not acknowledge to have terminated the Claimant's contract. Its position is that the Claimant failed to show up, when called to a disciplinary hearing, and the process was suspended, in the hope the Claimant would show up.

25. The Claimant states it is true he was invited. He turned up but was not heard.

26. The Respondent did not make any attempts to continue with the disciplinary process, after it alleges the Claimant failed to attend hearing. There is no letter calling the Claimant to continue with the hearing. The initial letter inviting the Claimant indicated if he failed to turn up, the Respondent would take appropriate action. What action, assuming the Claimant failed to turn up, did the Respondent take? The Court can only assume the Respondent removed the Claimant from its payroll and terminated his contract. It is not conceivable that the disciplinary process was left hanging, or that the Claimant, who expressed his love for the work he did, would just abandon his work and walk away.

27. The disciplinary proceedings recorded in the minutes dated 10th February 2014 are not helpful. The minutes state that the hearing took place, in the absence of the Claimant. It is not clear who gave evidence, and what verdict the hearing resulted in.

28. Termination was at the instigation of the Respondent. It was not based on valid ground, or fair procedure under Sections 41, 43 and 45 of the Employment Act 2007. It was unfair. ***The Claimant is entitled to compensation under Section 49 of the Employment Act 2007, which is granted at the equivalent of 10 months' salary, at Kshs. 180,000.***

29. There were no grounds, such as would justify summary dismissal for gross dismissal, under Section 44 [4] of the Employment Act 2007. Notice is payable.

30. ***The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 18,000.***

31. No order on the costs.

32. ***Interest granted to the Claimant at the rate of 14% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: annual leave pay at Kshs. 132,923; equivalent of 10 months' gross salary at Kshs. 180,000 in compensation for unfair termination; and notice pay at Kshs. 18,000- total Kshs. 330,923.

c) No order on the costs.

d) Interest granted to the Claimant at 14% per annum from the date of Judgment, till payment in full.

Dated and delivered at Mombasa this 23rd day of June 2017

James Rika

Judge